

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

May 25, 2012

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

PSF No.: 08OD-068

OAHU

(1) Report on an Agreement for an Easement for Encroaching Seawall and Filled Lands; (2) Rescind Prior Board Action of April 27, 2012, Item D-14, Regarding Enforcement Action Against TLM Partners Ltd. for, Inter Alia the Removal of the Encroaching Seawall and Filled Lands; situated at Niu, Honolulu, Oahu, Tax Map Key (1) 3-7-002:seaward of 009; and (3) Dismiss And/Or Permit the Withdrawal of TLM Partners Ltd's Petition for Contested Case Hearing Regarding the Prior Board Action of April 27, 2012, Item D-14.

BACKGROUND:

On April 27, 2012, under agenda item D-14, the Board approved the staff's report on the negotiation for an easement for seawall and filled lands purposes and the recommended enforcement action for encroaching on State lands at the subject location. The approved recommendation is provided below:

"A. *Pursuant to Hawaii Revised Statutes Section 171-6 (12), authorize injunctive relief through the issuance of an order to TLM Partners Ltd, for the removal of all encroachments located on public land seaward of Tax Map Key No.: (1) 3-7-002:009, including but not limited to, the CRM wall, wire fence, and filled lands, at its own cost, as shown on the map filed as CSF No. 24735, dated October 22, 2008 and attached herein as Exhibit A-1-D, within 180 days of the date of this approval.:*

B. *Pursuant to Hawaii Revised Statutes Section 171-6 (12):*

1. *Authorize the imposition of a fine against TLM Partners, Ltd., in the amount of \$1000.00 per day for the violation, commencing on the date of the Board's Order, if the encroachment is not removed to the Department's satisfaction within 180 days as noted above;*
2. *Order TLM Partners, Ltd. to pay administrative costs to the*

Department in the amount of at least \$4,295.00; and, if necessary, additional costs incurred by Department for the removal of the encroachment and restoration of the land to its original condition."

At the meeting, the Board indicated their desire to see the four (4) triggers for payment agreed to, which mean full payment of the lien being made upon the first of one of the following to occur: (1) upon a sale or transfer of the secured property; (2) issuance of a shoreline certification; (3) issuance of a building permit; or (4) March 1, 2022¹.

By email dated May 11, 2012, TLM Partners, Ltd ("TLM"), through its attorney, agreed to the four triggers for the easement.

For the Board's information, TLM is currently reviewing the easement document, promissory note, and mortgage attached as **Exhibits A, B, and C** respectively.

Further, TLM filed a petition for contested case hearing on May 7, 2012 and the Department of the Attorney General is reviewing the petition. In view of the agreement noted above, staff recommends the Board dismiss and/or withdrawal of the petition for contested case hearing filed by TLM.

In addition, the enforcement action approved by the Board on April 27, 2012 needs to be rescinded in view of the agreement noted above.

RECOMMENDATION: That the Board:

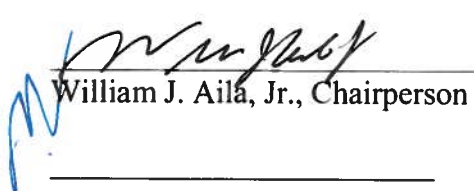
- A. Rescind its prior action dated April 27, 2012, item D-14, as noted above.
- B. Dismiss and/or permit the withdrawal of the petition from TLM Partners, Ltd for contested case hearing regard the Board action of April 27, 2012, item D-14.

Respectfully Submitted,



Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

¹ The 10-year trigger date is changed to June 1, 2022 in the exhibit attached in anticipation of the actual execution date of the easement document.

Right, privilege, and authority to
construct, use, maintain, and repair the
seawall and landscape area,

in, over, under and across that/those certain parcel(s) of
land(s) ("area"), also referred to as "premises," situate at
5677 Kalaniana'ole Highway, Honolulu, Hawaii (Tax Map Key
No. (1) 3-7-002: seaward of 009, being identified as "Easement
Area," containing an area of 2,195 square feet, more or less,
more particularly described in Exhibit "A" and delineated on
Exhibit "B," both of which are attached hereto and made parts
hereof, said exhibits being respectively, a survey description
and survey map prepared by the Survey Division, Department of
Accounting and General Services, State of Hawaii, designated
C.S.F. No. 24,735 and dated October 22, 2008, TOGETHER WITH the
rights of ingress and egress to and from the easement area for
all purposes in connection with the rights hereby granted.

TO HAVE AND TO HOLD the easement rights unto the
Grantee, its successors and assigns, SUBJECT, HOWEVER, to the
following terms, conditions and covenants:

1. The term of this easement shall be 55 (00) years,
commencing on the ____th day of _____, _____, up to and
including the ____th day of _____, _____, unless sooner
terminated as hereinafter provided, the Grantor reserving and
the Grantee yielding and paying to the Grantor at the Office of
the Department of Land and Natural Resources, Honolulu, Oahu,
State of Hawaii, a one time payment of \$135,135, with said
payment being made no later than: (1) June 1, 2022; (2) upon the
sale of Grantee's property; (3) issuance of a shoreline
certification; or (4) issuance of a building permit exceeding
\$10,000, whichever is first to occur, and the easement being
located at 5677 Kalaniana'ole Highway, Honolulu, Hawaii (TMK No.
(1) 3-7-002: seaward of 009), as determined by the Land Board at
its January 27, 2012 meeting. The payment shall be evidenced by
a note and secured by a mortgage on Grantee's property located
at 5677 Kalaniana'ole Highway, Honolulu, Hawaii (TMK No. (1) 3-7-
002: 009).

THE GRANTOR AND THE GRANTEE COVENANT AND AGREE AS
FOLLOWS:

1. The Grantee shall at all times with respect to
the easement area use due care for public safety and agrees to
indemnify, defend, and hold the Grantor harmless from and

against any claim or demand for loss, liability, or damage, including claims for bodily injury, wrongful death, or property damage, arising out of or resulting from: 1) any act or omission on the part of the Grantee relating to the Grantee's use, occupancy, maintenance, or enjoyment of the easement area; 2) any failure on the part of the Grantee to maintain the easement area and sidewalks, roadways, and parking areas adjacent thereto in the Grantee's use and control, and including any accident, fire or nuisance, growing out of or caused by any failure on the part of the Grantee to maintain the easement area in a safe condition; and 3) from and against all actions, suits, damages, and claims by whomsoever brought or made by reason of the Grantee's non-observance or non-performance of any of the terms, covenants, and conditions of this grant of non-exclusive easement or the rules, regulations, ordinances, and laws of the federal, state, municipal or county governments.

2. The Grantor reserves unto itself, its successors and assigns, the full use and enjoyment of the easement area and the right to grant to others rights and privileges for any and all purposes affecting the easement area, provided, however, that the rights herein reserved shall not be exercised by the Grantor and similar grantee(s) in any manner which interferes unreasonably with the Grantee in the use of the easement area for the purposes for which this easement is granted.

3. The placement of all improvements in or upon the easement area by the Grantee shall be done without cost or expense to the Grantor and shall remain the property of the Grantee and subject to the terms of paragraphs 10 and 14 may be removed or otherwise disposed of by the Grantee at any time; provided, that the removal shall be accomplished with minimum disturbance to the easement area which shall be restored to its original condition, or as close thereto as possible, within a reasonable time after removal.

4. Upon completion of any work performed in or upon the easement area, the Grantee shall remove therefrom all equipment and unused or surplus materials, if any, and shall leave the easement area in a clean and sanitary condition satisfactory to the Grantor.

5. Throughout the term of this easement (unless sooner abandoned or otherwise terminated herein) this easement shall run with the land and shall inure to the benefit of the real property described as tax map key no. (1)3-7-002: 009,

provided however, that the Grantee shall carry the required liability insurance covering the easement area and comply with all other terms and conditions as provided herein, and that the Grantee, or authorized representative of the Grantee's estate, when this easement is sold, assigned, conveyed, or otherwise transferred, shall notify the Grantee's successors or assigns of the insurance requirement in writing, separate and apart from this easement document.

6. The Grantee shall keep the easement area and the improvements thereon in a safe, clean, sanitary, and orderly condition, and shall not make, permit or suffer, any waste, strip, spoil, nuisance or unlawful, improper, or offensive use of the easement area.

7. The Grantee covenants, for itself, its successors and assigns, that the use and enjoyment of the land herein granted shall not be in support of any policy which discriminates against anyone based upon race, creed, sex, color, national origin, religion, marital status, familial status, ancestry, physical handicap, disability, age or HIV (human immunodeficiency virus) infection.

8. The Grantee, in the exercise of the rights granted herein, shall comply with all of the requirements of the federal, state, and county authorities and shall observe all county ordinances and state and federal laws, rules and regulations, now in force or which may hereinafter be in force.

9. These easement rights shall cease and terminate, and the easement area shall automatically be forfeited to the Grantor, without any action on the part of the Grantor, in the event of non-use or abandonment by the Grantee of the easement area, or any portion thereof, for a consecutive period of one (1) year.

10. The Grantee shall, at the end of the term or other sooner termination of this easement, peaceably deliver unto the Grantor possession of the premises, together with all improvements existing or constructed thereon or Grantee shall remove such improvements and shall restore the premises to their original state, or as close thereto as possible, within a reasonable time and at the expense of the Grantee. If the Grantee does not remove the improvements or restore the premises to the satisfaction of the Grantor, the Grantor may effect such action and the Grantee agrees to pay all costs and expenses for

such action. Furthermore, upon the expiration, termination, or revocation of this easement, should the Grantee fail to remove any and all of Grantee's personal property from the premises, after notice thereof, the Grantor may remove any and all of Grantee's personal property from the premises, and either deem the property abandoned and dispose of the property or place the property in storage at the cost and expense of Grantee and the Grantee does agree to pay all costs and expenses for disposal, removal, or storage of the personal property. This provision shall survive the termination of the easement.

11. The Grantee shall procure and maintain, at its own cost and expense, in full force and effect throughout the term of this easement, comprehensive general liability insurance, or its equivalent, with an insurance company or companies licensed or authorized to do business in the State of Hawaii with an AM Best rating of not less than "A-" or other comparable and equivalent industry rating, in an amount of at least \$1,000,000.00 for each occurrence and \$2,000,000.00 aggregate, and with coverage terms acceptable to the Chairperson of the Board of Land and Natural Resources. The policy or policies of insurance shall name the State of Hawaii as an additional insured and a copy shall be filed with the State of Hawaii, Department of Land and Natural Resources. The insurance shall cover the entire easement area, including all buildings, improvements, and grounds and all roadways or sidewalks on or adjacent to the easement in the use or control of the Grantee.

The Grantee, prior to entry and use of the easement area or within fifteen (15) days after the effective date of this easement, whichever is sooner, shall furnish the Grantor with a certificate(s) showing the policy(s) to be initially in force, keep the certificate(s) on deposit during the entire easement term, and furnish a like certificate(s) upon each renewal of the policy(s). This insurance shall not be cancelled, limited in scope of coverage, or nonrenewed until after thirty (30) days written notice has been given to the Grantor.

The Grantor shall retain the right at any time to review the coverage, form, and amount of the insurance required by this easement. If, in the opinion of the Grantor, the insurance provisions in this easement do not provide adequate protection for the Grantor, the Grantor may require Grantee to obtain insurance sufficient in coverage, form, and amount to provide adequate protection. The Grantor's requirements shall

be reasonable but shall be designed to assure protection for and against the kind and extent of the risks which exist at the time a change in insurance is required. The Grantor shall notify Grantee in writing of changes in the insurance requirements and Grantee shall deposit copies of acceptable insurance policy(s) or certificate(s) thereof, with the Grantor incorporating the changes within thirty (30) days after receipt of the notice.

The procuring of the required policy(s) of insurance shall not be construed to limit Grantee's liability under this easement nor to release or relieve the Grantee of the indemnification provisions and requirements of this easement. Notwithstanding the policy(s) of insurance, Grantee shall be obligated for the full and total amount of any damage, injury, or loss caused by Grantee's negligence or neglect connected with this easement.

It is agreed that any insurance maintained by the Grantor will apply in excess of, and not contribute with, insurance provided by Grantee's policy.

12. Grantor reserves the right to withdraw the easement for public use or purposes, at any time during the term of this easement upon the giving of reasonable notice to Grantee. Upon withdrawal of the easement, Grantor shall return or credit to Grantee a portion of the one-time payment described in paragraph 1. For purposes of determining the amount to be returned or credited to the Grantee, the term "net payment" shall mean the one-time payment described in paragraph 1 reduced by any non-refundable portion of the one-time payment, if any, that Grantor was required by statute to pay to any other entity or body. The amount returned to Grantee shall be the net payment prorated for the unused term of the easement.

13. The Grantee shall not mortgage, hypothecate, or pledge the premises, any portion, or any interest in this easement without the prior written approval of the Chairperson of the Board of Land and Natural Resources and any mortgage, hypothecation, which approval shall not be unreasonably withheld or pledge without the approval shall be null and void.

14. Time is of the essence in this agreement and if the Grantee shall fail to pay the rent, or any part, at the times and in the manner provided within thirty (30) calendar days after delivery by the Grantor of a written notice of breach

or default, or if the Grantee shall become bankrupt, or shall abandon the premises, or if this easement and premises shall be attached or taken by operation of law, or if any assignment is made of the Grantee's property for the benefit of creditors, or if Grantee shall fail to observe and perform any of the covenants, terms, and conditions contained in this easement and on its part to be observed and performed, and this failure shall continue for a period of more than sixty (60) calendar days after delivery by the Grantor of a written notice of breach or default, by personal service, registered mail or certified mail to the Grantee at its last known address and to each mortgagee or holder of record having a security interest in the premises, the Grantor may, subject to the provisions of Section 171-21, Hawaii Revised Statutes, at once re-enter the premises, or any part, and upon or without the entry, at its option, terminate this easement without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract; and in the event of termination, all improvements shall at the option of the Grantor remain and become the property of the Grantor at the option of the Grantor or shall be removed by Grantee; furthermore, the Grantor shall retain all rent paid in advance to be applied to any damages.

15. In the event the Grantor seeks to forfeit the privilege, interest, or estate created by this easement, each recorded holder of a security interest may, at its option, cure or remedy the default or breach of rent payment within thirty (30) calendar days or any other default or breach within sixty (60) calendar days, from the date of receipt of the Grantor's notice, or within an additional period allowed by Grantor for good cause, and add the cost to the mortgage debt and the lien of the mortgage. Upon failure of the holder to exercise its option, the Grantor may: (a) pay to the holder from any moneys at its disposal, including the special land and development fund, the amount of the mortgage debt, together with interest and penalties, and secure an assignment of the debt and mortgage from the holder or if ownership of the privilege, interest, or estate shall have vested in the holder by way of foreclosure, or action in lieu thereof, the Grantor shall be entitled to the conveyance of the privilege, interest, or estate upon payment to the holder of the amount of the mortgage debt, including interest and penalties, and all reasonable expenses incurred by the holder in connection with the foreclosure and preservation of its security interest, less appropriate credits, including income received from the privilege, interest, or estate subsequent to the foreclosure; or (b) if the property cannot be

reasonably reassigned without loss to the State, then terminate the outstanding privilege, interest, or estate without prejudice to any other right or remedy for arrears of rent or for any preceding or other breach or default and use its best efforts to redispense of the affected land to a qualified and responsible person free and clear of the mortgage and the debt secured; provided that a reasonable delay by the Grantor in instituting or prosecuting its rights or remedies shall not operate as a waiver of these rights or to deprive it of a remedy when it may still otherwise hope to resolve the problems created by the breach or default. The proceeds of any redistribution shall be applied, first, to reimburse the Grantor for costs and expenses in connection with the redistribution; second, to discharge in full any unpaid purchase price or other indebtedness owing the Grantor in connection with the privilege, interest, or estate terminated; third, to the mortgagee to the extent of the value received by the State upon redistribution which exceeds the fair market grant value of the land as previously determined by the State's appraiser; and fourth, to the owner of the privilege, interest, or estate.

16. In case the Grantor shall, without any fault on its part, be made a party to any litigation commenced by or against the Grantee as a result of this grant of non-exclusive easement (other than condemnation proceedings), the Grantee shall pay all costs, including reasonable attorney's fees and expenses incurred by or imposed on the Grantor; furthermore, the Grantee shall pay all costs, including reasonable attorney's fees and expenses, which may be incurred by or paid by the Grantor in enforcing the covenants and conditions of this grant of non-exclusive easement, or in the collection of delinquent rental, fees, taxes, and any and all other applicable charges attributed to said easement area.

17. The Grantee shall not cause or permit the escape, disposal or release of any hazardous materials except as permitted by law. Grantee shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the easement area any such materials except to use in the ordinary course of Grantee's business, and then only after written notice is given to Grantor of the identity of such materials and upon Grantor's consent which consent may be withheld at Grantor's sole and absolute discretion. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been

any release of hazardous materials by Grantee, then the Grantee shall be responsible for the reasonable costs thereof. In addition, Grantee shall execute affidavits, representations and the like from time to time at Grantor's request concerning Grantee's best knowledge and belief regarding the presence of hazardous materials on the easement area placed or released by Grantee.

The Grantee agrees to indemnify, defend, and hold Grantor harmless, from any damages and claims resulting from the release of hazardous materials on the easement area occurring while Grantee is in possession, or elsewhere if caused by Grantee or persons acting under Grantee. These covenants shall survive the expiration or earlier termination of this easement.

For the purpose of this easement "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or bylaw, whether existing as of the date hereof, previously enforced, or subsequently enacted.

18. Intentionally omitted.

19. Intentionally omitted.

20. The Grantee shall at all times during the term of this easement keep trim all vegetation growing within, over, or onto the easement area so that it does not present a threat to public safety by creating or contributing to roadway, waterway, or pedestrian obstruction, visual obstruction to operators of vehicles, fire hazards, or interference with or downing of power lines.

21. No building, structure or improvements other than the existing seawall and landscaping area shall be placed or constructed within the easement area.

22. The Grantee acknowledges and agrees that the existing seawall described in Exhibit "A" and delineated on Exhibit "B" herein is nonconforming and, further, that the Grantee is prohibited from extending the seawall seaward of its present location. Furthermore, the Grantee shall keep the

seawall and landscaping area in good condition and repair; provided, however, if the seawall and landscaping area is/are substantially or completely destroyed as determined by this Grantor, this easement and all rights granted herein shall cease and terminate automatically without any further action on the part of the Grantor, subject to the return of a portion of the one-time payment, as described in paragraph 12

23. The public shall have access across the easement area at all times.

24. The Grantee recognizes and acknowledges that the seawall which is the subject of this easement exists for the sole purpose of benefiting the property upland of the seawall and that the benefits of the seawall are secured by interrupting and altering the normal accretion and erosion of the shoreline. Accordingly, the Grantee shall hold harmless, defend, and indemnify the State of Hawaii, its boards, departments, agencies, and public and appointed officials from any and all claims for harm, taking, damages, loss of land, or specific performance that may arise out of or result from the existence and effect of the seawall on the flow of ocean water that, in turn, may affect or cause lateral erosion of shoreline land in either direction along the shore from the seawall.

25. The Grantee shall comply with all applicable federal and state environmental impact regulations.

26. The Grantee shall maintain and employ debris, pollution and contamination control measures, safeguards and techniques to prevent debris, pollution or contamination to the ocean waters, streams or waterways resulting from the Grantee's, its invitee's, or its agent's use, maintenance, repair and operation of the easement area, and shall take immediate corrective action in the event of such pollution or contamination to immediately remove the cause of such pollution or contamination, and shall immediately clean the easement area and its surrounding waters of such pollutant or contaminant and restore to the Grantor's satisfaction the areas affected by such pollution or contamination, all at the Grantee's own cost and expense.

27. The Grantee shall maintain, repair and upkeep the existing seawall in a condition satisfactory to the Grantor, and in a manner that will enhance the public shoreline and access thereto. Any improvements to the existing seawall shall be

subject to the prior written approval of the Grantor. Upon abandonment, expiration or termination of this easement, if desired by the Grantor, the Grantee, its successors and assigns, at its sole cost and expense, shall remove the seawall and restore the area to a condition satisfactory to the Grantor.

28. Throughout the term of this easement, the disputed encroachment onto State land brought before the Board of Land and Natural Resources is deemed to have been resolved between Grantor and Grantee as referenced in HAR § 13-222-19, for purposes of processing any requested shoreline certification application.

IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and the parties hereto have caused this Indenture to be executed as of the day, month, and year first above written.

STATE OF HAWAII

Approved by the Board of
Land and Natural Resources
at its meeting held on
_____.

By
Chairperson
Board of Land and
Natural Resources

GRANTOR

By

GRANTEE
APPROVED AS TO FORM:

Deputy Attorney General

Dated:

PROMISSORY NOTE

\$135,135.00

_____, _____

ON OR BEFORE: (1) June 1, 2022; (2) upon the sale of Grantee's property; (3) issuance of a shoreline certification; or (4) issuance of a building permit exceeding \$10,000, whichever first occurs,, the undersigned, jointly and severally, promise to pay to the order of State of Hawai'i, Department of Land and Natural Resources, at 1151 Punchbowl Street, Room 130, Honolulu, Hawai'i 96813, or at such other place as the holder hereof may designate from time to time, the principal sum of ONE HUNDRED THIRTY FIVE THOUSAND, ONE HUNDRED THIRTY FIVE AND NO/100 DOLLARS (\$135,135.00) without interest, except that interest shall accrue after default as provided below. The undersigned may prepay this Note at any time without penalty.

Should default be made in payment (or any part thereof) when due, then this Note shall thereafter bear interest at the rate of ten percent (10%) per annum until payment is made.

Principal and interest (if any) shall be payable in lawful money of the United States of America.

If the undersigned default in any payment of any portion of this Note, the undersigned shall pay all attorneys' fees and such expenses as the holder of this Note incurs to compel the payment of this Note, whether or not the holder files suit.

This Note shall be construed under the laws of the State of Hawaii.

TLM PARTNERS, LTD.

by _____
its

SECURED BY REAL PROPERTY PURCHASE MONEY MORTGAGE AND
FINANCING STATEMENT OF EVEN DATE HERewith.

PROMISSORY NOTE

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COUNTY OF _____)

LAND COURT SYSTEM

REGULAR SYSTEM

Return By Mail () Pickup (x) To:
Damon Key Leong Kupchak Hastert (GWK/CHKC)
1003 Bishop Street, Suite 1600
Honolulu, Hawaii 96813
Telephone: 531-8031

(This document contains ___ pages)

TMK: (1) 3-7-002-009

MORTGAGE

THIS MORTGAGE (the "Mortgage") made this _____ day of _____, 2012, by and between **TLM PARTNERS, LTD.**, a Colorado limited partnership, whose address is 1568 Calzada Avenue, Santa Ynez, California 93460, hereinafter referred to as the "Mortgagor" or "Borrower", in favor of and for the benefit of the **STATE OF HAWAII**, Board of Land and Natural Resources ("Board"), through the Land Division of the Department of Land and Natural Resources, whose address is Post Office Box 621, Honolulu, Hawaii 96809, hereinafter called the "Mortgagee,"

WITNESSETH THAT:

A. OBLIGATIONS AND LIABILITIES SECURED BY THIS MORTGAGE. The Mortgagor does hereby covenant and agree as follows:

A.1. THIS MORTGAGE DOES HEREBY SECURE the payment of **ONE THOUSAND THIRTY-FIVE HUNDRED ONE HUNDRED THIRTY-FIVE AND NO/100 DOLLARS (\$135,135.00)** on or before: (1) June 1, 2022; (2) upon the sale of Grantee's property; (3) issuance of a shoreline certification; or (4) issuance of a building permit exceeding \$10,000, whichever first occurs, ("Payment") and to secure the payment thereof according to the provisions of that certain promissory note executed concurrently herewith by the Mortgagor, as maker, and made payable to the Mortgagee, hereinafter referred to as the "Note";—and all renewals, extensions and modifications thereof, without interest except as provided in the Note,

AND ALSO to secure the observance and performance by the Mortgagor of all covenants, conditions and agreements required to be observed and performed by the Mortgagor under this Mortgage and the payment (including, but not limited to, all sums expended or advanced pursuant thereto), the observance and the performance of, all covenants, conditions and agreements required to be paid, observed and performed by the Mortgagor and Borrower under the following documents (all of the following documents have been executed and delivered to Mortgagee concurrently with this Mortgage):

A.1.1. This Mortgage covering the properties described in Exhibit "A" attached hereto and made a part hereof;

A.1.2. That certain Agreement dated _____, 20__, made and delivered concurrently herewith by Mortgagor to Mortgagee and any renewals, extensions and modifications thereof being hereinafter referred to as the "Agreement";

A.1.3. That certain Easement dated _____, 20__, made and delivered concurrently herewith by Mortgagor to Mortgagee and any renewals, extensions and modifications thereof being hereinafter referred to as the "Easement";

A.1.4. All other instrum

ents, agreements or documents executed by any party concurrently herewith or otherwise in connection with the foregoing documents or Payment;

all of the foregoing documents, together with all future modifications thereof, being hereinafter separately referred to as a "Payment Document" and collectively referred to as the "Payment Documents";

B. DEFINITIONS

B.1. "Property" refers to the parcel described in EXHIBIT "A," which is located at 5677 Kalaniana'ole Highway, Honolulu, Hawaii 96821 (Tax Map Key No. (1) 3-7-002:009).

B.2. "Easement Area" refers to the area and seawall *makai* of the Property described in EXHIBIT "B," and further identified as Tax Map Key No. (1) 3-7-002:seaward of 009.

C. GRANT OF MORTGAGE

THE MORTGAGOR DOES HEREBY grant, bargain, sell, assign and convey unto the Mortgagee all of the Mortgagor's right, title and interest in and to the following Property:

TOGETHER WITH all buildings and improvements now located on the real property described above and any and all buildings, improvements and building materials that may be placed thereon during the existence of this Mortgage and all rents, royalties, profits, revenues, income and other benefits arising from the use or enjoyment of all or any portion of such property or any contract pertaining to the use or enjoyment thereof;

ALSO TOGETHER with all furniture, furnishings, machinery, appliances, apparatus, equipment, inventory, fittings, fixtures and articles of personal property of every kind and nature whatsoever, other than consumable goods, now or hereafter located in or upon such real property or any part thereof (hereinafter called "Equipment") and now owned or hereafter acquired by the Mortgagor, including all of the right, title and interest of the Mortgagor in and to any equipment which may be subject to any retail installment contract, conditional sale contract or security agreement superior in lien to the lien of this Mortgage, it being understood and agreed that all of the Equipment is part and parcel of the improvements on such real property and appropriated to the use thereof, and whether affixed or annexed or not, shall for the purpose of this Mortgage be deemed conclusively to be real estate and conveyed hereby, the Mortgagor agreeing to execute and deliver, from time to time, such further instruments as may be requested by the Mortgagee to confirm the lien of this Mortgage on the Equipment;

ALSO TOGETHER with any and all awards or payments, including interest thereon, and the right to receive the same, which may be made with respect to such real property and improvements as a result of (a) the exercise of the right of eminent domain, (b) the alteration of the grade of any street, or (c) any other injury to or decrease in the value of such real property to the extent of all amounts which may be secured by this Mortgage at the date of receipt of any such award or payment by the Mortgagee, and of the reasonable counsel fees, costs and disbursements incurred by the Mortgagee in connection with the collection of such award or payment, the Mortgagor agreeing to execute and deliver, from time to time, such further instruments as may be required by the Mortgagee to confirm such assignment to the Mortgagee of any such award or payment;

ALSO TOGETHER with all right, title and interest of the Mortgagor in and to (1) all leases, partial assignments, subleases and other contracts of conveyance covering all or any portion of such real property or the Equipment, and any and all modifications and extensions thereof; (2) all binders or policies of insurance of any kind covering all or any portion of such real property or the Equipment, and any riders, amendments, extensions, renewals, supplements or revisions thereof; (3) any and all accounts (as defined in Section 490:9-106, Hawaii Revised Statutes) which may in any way pertain to the business of the Mortgagor; and (4) any and all general intangibles (as defined in Section 490:9-106, Hawaii Revised Statutes) including contracts, permits, licenses, certificates, authorizations, refunds, rebates, security deposits, trademarks and tradenames, which may in any way pertain to business of the Mortgagor (the items of collateral described in this paragraph being hereinafter called the "Collateral");

~~C.1. — All right, title and interest of the Mortgagor in and to the Payment, which shall become due upon the sale of the Property.~~

~~C.2. — This Mortgage shall be subject and subordinate to any new or first mortgage executed by the Mortgagor.~~

~~C.3. — Mortgagor's liability under this Mortgage or under the AgreementNote secured by this Mortgage shall be enforceable only out of or against the Property encumbered by this~~

~~Mortgage and Agreement. The lien of any judgment against Mortgagor in any proceeding instituted on, under, or in connection with the Agreement Note or this Mortgage, or both, shall not extend to any property now or later owned by Mortgagor which is not mortgaged, pledged, or assigned as security for the Note Agreement.~~

~~C[11].43. Nothing contained in this Mortgage, or in the Agreement Note setting forth the obligations secured by this Mortgage, shall obligate Mortgagor further than to bind Mortgagor's right, title, and interest in the mortgaged premises. On default under this Mortgage or the Note, no deficiency or other personal judgment shall be demanded or entered against Mortgagor.~~ **INTENTIONALLY DELETED.**

D. MORTGAGE IS GRANTED UPON THE FOLLOWING CONDITIONS:

D.1. These presents shall be void:

D.1.1. if the Mortgagor shall well and truly pay, or cause to be paid, to the Mortgagee the principal amount of the Payment, according to the provisions of the Agreement Note, and if the Mortgagor shall discharge, or cause to be discharged, any and all obligations that now or hereafter may be or become owing, directly or contingently, by the Mortgagor to the Mortgagee under this Mortgage, whether or not the same are mature, of which obligations the books of the Mortgagee shall be prima facie evidence; and

D.1.2. if the Mortgagor shall observe and perform, or cause to be observed or performed, all of the covenants, conditions and agreements to be observed and performed by the Mortgagor under the Note Payment Documents; and

D.1.3. if the Mortgagee violates, withdraws or otherwise rescinds the Easement; and

D.1.4. if the Mortgagor shall pay, or cause to be paid, the costs of release.

~~D.2. Subject to the terms hereof, until the happening of an Event of Default, as hereinafter defined, the Mortgagor shall be permitted to use and possess the Easement Area pursuant to the Easement.~~

E. EVENT OF DEFAULT

If Borrower shall fail to pay the principal payable under the Agreement Note or this Mortgage upon the sale of the Property on or before the deadlines noted above.

F. REMEDIES FOR DEFAULT

UPON THE OCCURRENCE OF ANY ONE OR MORE EVENTS OF DEFAULT, THEN, AND IN ANY SUCH EVENT,

F.1. **Acceleration.** Upon the sale of the Property, the Mortgagee may, without notice, presentment or demand, declare the unpaid principal amount of the Agreement Note thereon

unpaid to be immediately due and payable, and such principal amount shall thereupon become and be immediately due and payable;

F.2. Judicial Foreclosure. The Mortgagee may proceed by judicial action at law or in equity (including, without limitation, pursuant to Chapter 667 of the Hawaii Revised Statutes, as amended), or by any other appropriate remedy, to enforce payment of the [Agreement Note](#) or performance of any other obligation secured hereby, and to foreclose this Mortgage, and to sell, in whole, or to the extent permitted by law, in part, the Mortgaged Property under the judgment or decree of a court or courts of competent jurisdiction;

F.3. The Mortgagee's Right to Bid and Purchase. Upon any such sale, the Mortgagee may bid for and purchase the Mortgaged Property or any part thereof, and, upon compliance with the terms of sale, may hold, retain and possess and dispose of such property in its absolute right without further accountability. The Mortgagee, at any such sale, may bid by credit up to the amount secured by this Mortgage, and without payment of a deposit or down payment of any kind. The Mortgagee shall not be required at confirmation of any public auction or private sale to extend credit or financing of any kind to the Mortgagor or any other party that may acquire the Mortgaged Property.

F.4. Application of Proceeds. The Mortgagee may apply the proceeds of any such sale, first, to the costs and expenses of such sale and all proceedings in connection therewith, including, but not limited to, its attorney's fees and costs, and next to the payment of any unreimbursed disbursements made by the Mortgagee for taxes or assessments or other charges prior to the lien of this Mortgage; and next, to the payment of the unpaid principal sum of the Mortgagor to the Mortgagee, in such order as the Mortgagee shall determine. If such proceeds shall be insufficient to discharge the entire indebtedness under the Payment Documents, the Mortgagee waives any other legal recourse against the Mortgagor for the deficiency.

F.5. Perpetual Bar of the Mortgagor's Title. Any such sale shall, to the extent permitted by law, and only as to the unpaid ~~principal~~ amount of the [Agreement Note](#), be a perpetual bar, both at law and in equity, against the Mortgagor and all persons, partnerships, corporations and other entities lawfully claiming by or through or under the Mortgagor; and the Mortgagee is hereby irrevocably appointed the true and lawful attorney of the Mortgagor, in the Mortgagor's name and stead, for the purpose of effectuating any such sale, to execute and deliver all necessary deeds, conveyances, assignments, bills of sale and other instruments with power to substitute one or more persons, partnerships, corporations or other entities with like power; provided, that the Mortgagor shall ratify and confirm any such sale or transfer if required by the Mortgagee by delivering all proper conveyances or other instruments to such persons, partnerships, corporations or other entities as may be designated in any such request.

F.10. No Hinderance. In case of the occurrence of any Event of Default, neither the Mortgagor nor anyone claiming by, through or under the Mortgagor, to the extent the Mortgagor may lawfully so agree, shall or will set up, claim or seek to take advantage of any appraisal, valuation, stay, extension or redemption laws now or hereafter in force in any locality where any of the Mortgaged Property is situated, in order to prevent or hinder the enforcement or foreclosure of this Mortgage, or the absolute sale of the Mortgaged Property, or the final and

absolute putting into possession thereof, immediately after such sale, of the purchasers thereof; and the Mortgagor, for the Mortgagor and all who may claim under the Mortgagor, hereby waives, to the full extent that the Mortgagor may lawfully so do, the benefit of all such laws, and any and all right to have the estate comprised in the security intended to be created hereby marshalled upon any foreclosure of the lien hereof and agrees that the Mortgagee or any court having jurisdiction to foreclose such lien may sell the Mortgaged Property as an entirety.

F.11. Abandonment of Proceedings. In case the Mortgagee shall have proceeded to enforce any right hereunder and such proceedings shall have been discontinued or abandoned for any reason, then in every such case, the Mortgagor and the Mortgagee shall be restored to their former positions and rights hereunder with respect to the Mortgaged Property, and all rights, remedies and powers of the Mortgagee shall continue as if no such proceedings had been taken. No remedy herein reserved to the Mortgagee is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative and shall be in addition to any other remedy given hereunder or now or hereafter existing at law or in equity, or by statute.

F.12. No Impairment. Nothing in this Mortgage, the ~~Agreement Note or any of the other Payment Documents~~ shall affect or impair the right, which is unconditional and absolute, of the holder of the Agreement Note to enforce payment of the Note principal of the Agreement upon the sale of the Property, or the obligation of the Mortgagor, which is likewise unconditional and absolute, to pay such amounts at the respective times and places therein expressed.

G. THE MORTGAGOR'S WARRANTIES.

G.1. The Mortgagor's Warranties on Title to Land and Improvements. The Mortgagor hereby warrants and represents that:

G.1.1. if all or a portion of the Mortgaged Property is fee simple property, with respect to that property, the Mortgagor is the owner in fee simple of the Mortgaged Property and has good right to grant and convey the same as aforesaid;

G.1.2. the Mortgagor's interest in and to the Mortgaged Property is free and clear from all encumbrances and liens, except for the Encumbrances, if any;

G.1.3. the Mortgagor will **WARRANT AND DEFEND** the Mortgaged Property unto the Mortgagee forever against the lawful claims and demands of all persons whomsoever, except for the Encumbrances, and subject and subordinate to any new or first mortgage executed by the Mortgagor, if any; and

G.1.4. the Mortgaged Property is free of any flammable explosives, radioactive materials, asbestos, organic compounds known as polychlorinated biphenyls, chemicals known to cause cancer or reproductive toxicity, pollutants, contaminants, hazardous wastes, toxic substances or related materials, including, without limitation, any substances defined as or included in the definition of "hazardous substances," "hazardous wastes," "hazardous materials," or "toxic substances" (collectively, "Hazardous Materials") under any federal, state or local laws, ordinances or regulations, now or hereafter in effect, relating to environmental conditions,

industrial hygiene or Hazardous Materials on, under or about the Mortgaged Property, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq., the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Clean Water Act, 33 U.S.C. Section 1251, et seq., the Clean Air Act, 42 U.S.C. Section 7401, et seq., the Toxic Substances Control Act, 15 U.S.C. Sections 2601 through 2629, the Safe Drinking Water Act, 42 U.S.C. Sections 300f through 300j, and any similar state and local laws and ordinances and the regulations now or hereafter adopted, published and/or promulgated pursuant thereto (collectively, the "Hazardous Materials Laws"). The Mortgaged Property is not currently used in a manner, and no prior use by the Mortgagor has occurred, which violates any Hazardous Materials Laws. Neither the Mortgagor nor any tenant has received any notice from a governmental agency for violation of Hazardous Materials Laws.

H. THE MORTGAGOR'S COVENANTS. The Mortgagor hereby covenants and agrees with the Mortgagee as follows:

H.1. Payment of Secured Obligations. The Mortgagor will pay, or cause to be paid, to the holder of the Agreement Note the amount principal due thereunder, all according to the provisions thereof, ~~and will also pay and discharge, or cause to be paid and discharged, any and all obligations that are now or hereafter may be or become owing by the Mortgagor to the Mortgagee under the Payment Documents.~~

H.2. Payment of Real Property Taxes, Assessments, etc. The Mortgagor will punctually pay and discharge, or cause to be paid and discharged, from time to time as the same shall become due, all Real Property taxes, rates, assessments, impositions, duties, water rates, sewer rates and other charges of every description to which the Mortgaged Property or any part thereof, or any improvements thereon, may during the term of this Mortgage become liable by authority of law, the payment of which shall be secured by this Mortgage; PROVIDED, HOWEVER, that Real Property taxes may be paid in semiannual installments and improvement or betterment assessments may be paid in annual installments, upon condition that, in each case, the same are not allowed to become delinquent, and that the Mortgagor will, upon request of Mortgagee, deposit or cause to be deposited a copy of the receipts therefor with the Mortgagee not later than the final date such taxes, assessments and charges may be paid without penalty.

H.3. Observance of Laws. The Mortgagor will duly observe and conform to all current and future laws, rules and regulations made by any governmental authority, and all valid requirements of any regulatory body which may have or acquire jurisdiction (collectively the "Laws"), which apply or relate to the Mortgaged Property, or the Mortgagor's activities at the Mortgaged Property.

H.4. Maintenance and Inspection. The Mortgagor will keep and maintain, or cause to be kept and maintained, all buildings, structures and improvements now located or hereafter constructed on the Mortgaged Property.

H.5. Waste, Unlawful Use, etc. The Mortgagor will absolutely not commit or suffer, or will prevent the committing or suffering of, any strip or waste, or unlawful, improper or offensive use of the Mortgaged Property, or any act or negligence whereby such property or any interest therein shall become liable to seizure or attachment or mesne or final process of law or whereby the lien provided hereby shall be impaired.

H.6. Sale, Transfer, Lease, etc.

H.6.1. The Mortgagor may lease the Mortgaged Property or any interest therein without first obtaining the prior written consent of the Mortgagee.

H.6.2. In the event of a sale (including a sale by way of an Agreement of Sale or similar instrument), assignment, conveyance or other transfer of any of the Mortgagor's interest in the Mortgaged Property secured by this Mortgage (a "Transfer"), at the closing of such Transfer or on the effective date of such Transfer, whichever occurs first, all amounts owed to Mortgagee under the ~~Agreement Note and other Payment Documents~~ shall be accelerated and shall be due and payable in full, and the Mortgagor shall pay, or cause to be paid, in full, to the Mortgagee all amounts owed under the ~~Note Agreement and the other Payment Documents~~. The provisions of this paragraph shall constitute a continuing covenant or condition, and any failure on the part of the Mortgagee to exercise the Mortgagee's option to declare all indebtedness due and payable on the occurrence of any one event hereinabove mentioned shall not prejudice the right of the Mortgagee to declare the indebtedness hereby secured at once due and payable on the occurrence of any other event hereinabove mentioned.

H.8. Future Liens and Mortgages.

~~H.8.1. This Mortgage shall be subject and subordinate to any new or first mortgage executed by the Mortgagor.~~

~~H.8.1.2. No Liens.~~ Except for junior liens in favor of Mortgagee, ~~and subject and subordinate to any new or first mortgage executed by the Mortgagor,~~ the Mortgagor will absolutely not create, suffer to be created or permit to remain, or will prevent the creation, the suffering of the creation, or the permitting to remain, upon the Mortgaged Property, or any part thereof, or the income therefrom, any mechanics', materialmen's, laborers', tax, statutory or other lien or charge, except the Encumbrances, and liens for taxes and assessments not yet payable or payable without penalty so long as payable; provided that nothing contained in this paragraph shall be deemed to require the Mortgagor to pay, or cause to be paid, any tax, assessment or charge, or to satisfy any involuntary lien, so long as the Mortgagor in good faith by appropriate action diligently pursued shall contest, or cause to be contested, the validity thereof (provided the security afforded by this Mortgage shall not thereby be subjected to any sale, forfeiture or loss, or reasonable probability thereof).

H.8.2. Future Mortgages. Except for junior liens in favor of Mortgagee, ~~and subject and subordinate to any new or first mortgage executed by the Mortgagor,~~ the Mortgagor will absolutely not, and will cause the Mortgagor to not, without the prior written consent of the

Mortgagee, create, suffer to be created or permit to remain upon the Mortgaged Property, or any part thereof, or the income therefrom, any additional junior or subordinate mortgage lien.

H.10. Insurance.

H.10.1. Insurance Generally. The Mortgagor shall, during the term of this Mortgage, at the Mortgagor's sole cost and expense and for the mutual benefit of the Mortgagor and the Mortgagee:

H.10.1.1. effect and maintain, or cause to be effected and maintained, any such insurance insuring all insurable properties constituting part of the Mortgaged Property, and all insurable activities of the Mortgagor in connection with the Mortgaged Property, against all risks (and in the amounts) usually insured against by persons owning and operating like properties in the locality where the Mortgaged Property is located; and

H.10.1.2. all such other forms of insurance and in such amounts as shall reasonably be required from time to time by Mortgagee or by governmental authority or regulation.

H.10.2. All insurance required under subparagraph H.10.1, above, shall be effected and maintained under valid and enforceable policies issued by insurance companies authorized to do business in the State of Hawaii.

H.10.3. Subject to any rights granted to the Mortgagor by law if the Mortgaged Property is residential property, all losses and monies payable to the Mortgagor under the insurance required under subparagraph H.10.1, above, shall be payable to the Mortgagee pursuant to a standard mortgage clause and lender's loss payable clause and shall be applied by the Mortgagee, at its option, either to rebuilding or repair of the loss, destruction or damage, or in the reduction of any indebtedness hereby secured. Any other insurance procured on such structures or improvements shall be payable as directed, and shall be claimable by, the Mortgagee. The Mortgagee's right to apply the proceeds is subject to the requirements of Hawaii law.

H.10.4. The Mortgagee shall not be responsible for such insurance or for the collection of any insurance proceeds, or for the insolvency of any insurer or insurance underwriter.

H.10.5. All such policies or other contracts for such insurance shall provide that the insurance shall not be invalidated as to the interest of the Mortgagee by any act or neglect of any person owning the property insured, or by any foreclosure or other proceedings, or notice of sale, or by any change in the title or ownership of the insured properties, or by occupation of any insured structures for purposes more hazardous than permitted by such policy or contract.

H.10.6. In the event of loss or physical damage to the Mortgaged Property, the Mortgagor shall give, or cause to be given, immediate notice thereof to the Mortgagee, and the Mortgagee may make proof of loss if the same is not made promptly by the Mortgagor.

H.10.7. All insurance coverage required under this Mortgage shall be subject to availability with responsible insurance companies authorized to do business in the State of Hawaii. Where such coverage is not (or is no longer) available, the Mortgagor shall purchase, effect and maintain, or cause to be purchased, effected and maintained, such other insurance coverage as is acceptable to the Mortgagee.

H.10.8. If the Mortgagor fails to effect and maintain, or fails to cause to be effected and maintained, insurance coverage as described above, the Mortgagee may, at the Mortgagee's option, obtain insurance coverage to protect the Mortgagee's rights in the Mortgaged Property as described in this Mortgage.

H.11. **Condemnation.** If the Mortgaged Property or any part thereof shall be condemned, the Mortgagee may appear and defend any such suit and the Mortgagee is hereby irrevocably authorized, subject to the right of the Mortgagor to use condemnation proceeds for restoring or replacing improvements, to collect all of the proceeds and apply the same upon any obligation secured hereby. All costs, expenses and attorneys' fees paid or incurred by the Mortgagee in the course of such proceedings shall constitute an advance hereunder.

Notwithstanding any taking by eminent domain or other injury to or decrease in value of the Mortgaged Property by any public or quasi-public authority or corporation, the Mortgagor will continue to cause to be paid, any unpaid principal sum, if any has become due, from an award or payment from such authority or corporation once it shall have been actually received by the Mortgagee, and any reduction in the principal sum resulting from the application by the Mortgagee of such award or payment as hereinafter set forth shall be deemed to take effect only on the date of such receipt. If, prior to the receipt by the Mortgagee of such award or payment, the Mortgaged Property shall have been sold on foreclosure of this Mortgage, the Mortgagee shall have the right to receive such award or payment to the extent of the mortgage debt remaining unsatisfied after such sale of the Mortgaged Property, with legal interest thereon and reasonable attorneys' fees, costs and disbursements incurred by the Mortgagee in connection with the collection of such award or payment. Should all or any part of the Mortgaged Property be taken by eminent domain, the Mortgagor hereby assigns to the Mortgagee, and forthwith upon payment thereof will cause to be deposited with the Mortgagee, the award for any Mortgaged Property so taken.

H.12. **Notice of Deposit of Insurance or Condemnation Proceeds.** The Mortgagor will, in case any proceeds of insurance upon the Mortgaged Property or any part thereof, or the proceeds of any award for the taking in eminent domain of the Mortgaged Property or any part thereof, are deposited with any person other than the Mortgagee, promptly notify, or cause the notification of, the Mortgagee in writing of the name and address of the person with whom such proceeds have been deposited and the amount so deposited.

H.13. **Application of Payments.** The Mortgagee shall have the right and is hereby expressly authorized to apply any rents, issues, profits and any other payments collected and received pursuant to the provisions of this Mortgage to the payment of any indebtedness of the Mortgagor to the Mortgagee hereby secured in any order which the Mortgagee may determine, and any such application shall in all respects be binding upon the Mortgagor.

H.14. Possession by the Mortgagor After Sale. In the event of a sale of the Mortgaged Property, or any part or parts thereof, under and by virtue of the provisions of this Mortgage, the purchaser or purchasers thereof shall have immediate and peaceable possession of the same, and if the Mortgagor shall remain in possession after the effective date of such sale, such possession shall be construed as a tenancy at sufferance only, giving unto the purchaser all remedies, by way of summary possession or otherwise, conferred by law in such case.

H.15. Further Instruments. The Mortgagor will, upon reasonable request of the Mortgagee, execute and deliver, or cause the execution and delivery of, such further instruments and do such further acts as may be necessary or proper to carry out more effectively the purpose of this Mortgage and to subject the Mortgaged Property to the lien hereof, and any renewals, additions, substitutions, replacements or betterments thereto.

H.16. Right of the Mortgagee to Prevent or Remedy Default. If the Mortgagor shall fail to observe or perform, or cause to be observed or performed, any of the terms, covenants and conditions required to be observed and performed by the Mortgagor under this Mortgage, unless the Mortgagor shall in good faith be contesting by appropriate action diligently pursued, or causing to be contested, the existence of such default, and the security afforded by this Mortgage shall not thereby be subjected to any sale, forfeiture or loss, or reasonable probability thereof, the Mortgagee may (but shall not be obligated to): (i) take any action the Mortgagee deems necessary or desirable to prevent or remedy any such default by the Mortgagor, or to otherwise protect the security of this Mortgage which the Mortgagee believes necessary or desirable to protect and enhance the security of this Mortgage and to obtain good and marketable title, unencumbered, to the Mortgaged Property, and (ii) enter in and upon the Mortgaged Property or any part thereof to such extent and as often as the Mortgagee, in its sole discretion, deems necessary or desirable in order to prevent or to remedy any such default by the Mortgagor or otherwise to protect the security of this Mortgage, and the Mortgagee may pay and advance for the account of the Mortgagor such sums of money as the Mortgagee, in the Mortgagee's sole discretion, deems necessary for any such purpose.

H.17. Right of the Mortgagee to Participate in Action Affecting Security. The Mortgagee may appear in and defend in any action or proceeding at law or in equity purporting to affect the security of this Mortgage, and in such event (except where the purported defect affecting the security hereof arises or results exclusively from any act or omission of the Mortgagee), the Mortgagee shall be allowed and paid, and the Mortgagor hereby agrees to pay, or cause the payment of, all of the Mortgagee's costs, charges and expenses, including cost of evidence of title and reasonable attorneys' fees, incurred in such action or proceeding in which the Mortgagee may appear.

H.18. Right of the Mortgagee to Extend Time of Payment, Substitute, Release Security, etc. Without affecting the liability of any person, including the Mortgagor, for the payment of any indebtedness secured hereby, or the lien or security interest of this Mortgage on the Mortgaged Property (or the remainder thereof), for the full amount of any indebtedness unpaid, the Mortgagee may from time to time, without notice and without affecting or impairing any of its rights under this Mortgage:

H.18.1. release any person liable for the payment of any of the indebtedness;

H.18.2. extend the time or otherwise alter the terms of payment of any of the indebtedness or accept a renewal note or notes to evidence such an extension or alteration;

H.18.3. accept payments or prepayments of principal without reducing the aggregate amount secured by this Mortgage, and make subsequent advances to the Mortgagor up to the amount described herein:

H.18.4. accept additional security therefor of any kind, including (but not limited to) deeds of trust, mortgages and security agreements;

H.18.5. alter, substitute or release any property securing the indebtedness;

H.18.6. resort for the payment of the indebtedness secured hereby to any securities therefor in such order and manner as it may see fit;

H.18.7. join in granting any easement or creating any restriction thereon; and

H.18.8. join in any extension or subordination or other agreement affecting this Mortgage or the lien or charge thereof.

H.19. **Governmental Approvals.** The Mortgagor will, at all times during the continuance of the Mortgage, maintain or cause to be maintained in full force and effect all governmental and municipal approvals and permits which are required to comply with all environmental, ecological and other governmental requirements relating to the Mortgaged Property or to the occupancy thereof.

I. THE MORTGAGEE'S WARRANTIES.

~~I.1. The Mortgagee's Warranties on Title to Land and Improvements. The Mortgagee hereby warrants and represents that:~~

~~I.1.1. if all or a portion of the Easement Area is fee simple property, with respect to that property, the Mortgagee is the owner in fee simple of the Easement Area and has good right to grant and convey the same as aforesaid;~~

~~I.1.4. the Easement Area is free of any Hazardous Materials under any federal, state or local laws, ordinances or regulations, now or hereafter in effect, relating to environmental conditions, industrial hygiene or Hazardous Materials on, under or about the Easement Area, including, without limitation, the Hazardous Materials Laws. The Easement Area is not currently used in a manner, and no prior use by the Mortgagee has occurred, which violates any Hazardous Materials Laws. Neither the Mortgagee nor any tenant has received any notice from a governmental agency for violation of Hazardous Materials Laws.~~INTENTIONALLY DELETED[A2].

J. MISCELLANEOUS PROVISIONS:

J.1. **No Waiver.** Any failure by the Mortgagee to insist upon the strict performance by the Mortgagor of any of the terms and provisions hereof shall not be deemed to be a waiver of any of the terms and provisions hereof, and the Mortgagee, notwithstanding any such failure, shall have the right thereafter to insist upon the strict performance by the Mortgagor of any and all of the terms and provisions of this Mortgage to be performed by the Mortgagor.

J.2. **Release, Substitution or Subordination of Security.** The Mortgagor acknowledges that this Mortgage and the Mortgages and/or Security Agreements given to the Mortgagee to secure the [Agreement Note](#) are solely for the Mortgagee's protection and benefit and not for the protection and benefit of the Mortgagor. Except as provided in the [Note Agreement or the Easement](#), the Mortgagor acknowledges and agrees that the Mortgagee is absolutely free to decide whether to release, to accept substitutions of or to subordinate any or all Mortgages and/or Security Agreements securing the [Agreement Note](#) at any time without affecting or lessening in any manner the obligations of the Mortgagor under the [Agreement Note](#), the Easement or this Mortgage. The Mortgagor waives any rights the Mortgagor might have under the law or equity to interfere with or make claims under the decisions the Mortgagee makes or the actions the Mortgagee takes to release, to accept substitutions of or to subordinate any Mortgages and/or Security Agreements securing the [Agreement Note](#). If Mortgagor requests a substitution for any of the Mortgaged Property, Mortgagor agrees to pay Mortgagee (i) for the appraisal costs (if appraisals are requested by Mortgagee) of the property proposed for substitution and all other Mortgaged Property, and (ii) for all of Mortgagee's attorney's fees, costs and expenses incurred in reviewing and processing any such requests.

J.3. **Security Agreement and Financing Statement Under Uniform Commercial Code.** This Mortgage shall constitute a security agreement and financing statement under the Uniform Commercial Code, as enacted in Hawaii; and the Mortgagor, as debtor, hereby grants to the Mortgagee, as secured party, a security interest in any or all of the Mortgaged Property, in addition to a mortgage lien upon the same as part of the realty. The Mortgagor will assist, or cause the assistance, in the preparation of and will execute from time to time, alone or with the Mortgagee, and deliver, file and record, any financing or continuation statements, mortgages or other instruments, and do such further acts as the Mortgagee may request to establish, maintain and perfect the security interests of the Mortgagee in the Mortgaged Property, and all renewals, additions, substitutions, improvements to the same and the proceeds thereof, and otherwise to protect the same against the rights and interests of third parties. The terms of this Mortgage shall be deemed commercially reasonable within the meaning of the Uniform Commercial Code.

J.4. **Further Definitions.** The terms "advances," "costs" and "expenses" shall include, but shall not be limited to, reasonable attorneys' fees whenever incurred. The terms "indebtedness" and "obligations" shall mean and include, but shall not be limited to all claims, demands, obligations and liabilities whatsoever, however arising, whether owing by the Mortgagor, individually or as a partner, or jointly or in common with any others, and whether absolute or contingent, and whether owing by the Mortgagor as principal debtor or as

accommodation maker or as indorser, liquidated or unliquidated, and whenever contracted, accrued or payable.

J.5. Paragraph Headings. The headings of paragraphs herein are inserted only for convenience and shall in no way define, describe or limit the scope or intent of any provisions of this Mortgage.

J.6. Parties in Interest. As and when used herein, the terms “Mortgagor” and “Borrower” shall mean and include the Mortgagor and Borrower above-named and their respective heirs, devisees, personal representatives, executors, successors and assigns; and the term “Mortgagee” shall mean and include the Mortgagee above-named and its successors and assigns. The use of any gender shall include all genders. If there is more than one “Mortgagor” or “Borrower”, the provisions of this Mortgage shall be binding, respectively, upon the Mortgagors and Borrowers, jointly and severally, and inure to the benefit of Mortgagee.

J.7. Applicable Laws. This Mortgage shall be governed by and shall be construed and interpreted under and pursuant to the substantive and internal laws of the State of Hawaii in spite of conflicts of laws concepts. If any provision of this Mortgage is held to be invalid or unenforceable, such will not affect the validity or enforceability of the other provisions of this Mortgage.

J.8. Notices. All notices, demands or documents which are required or permitted to be given or served under this Mortgage shall be in writing and sent by registered or certified mail addressed as set forth on page 1 of this Mortgage. Such addresses may be changed by addressee by serving notice as provided above. Service of any such notice shall be deemed complete on the earlier to occur of the actual date of delivery or three (3) days after mailing.

J.9. Additional Security for the [AgreementNote](#). The Mortgagee may have received additional mortgages and/or security instruments to protect the Mortgagee against possible losses that might result if the [AgreementNote](#) is not paid in full when due or otherwise paid in accordance with its terms and provisions. In such event, the Mortgagor agrees that if a default occurs under either the [AgreementNote](#), this Mortgage or such additional mortgages and/or security instruments, such default shall be a default under all of such instruments and that the Mortgagee is free to decide which mortgage or security instrument to take action against first and which order to take these actions. The Mortgagor waives any rights the Mortgagor might have under the law to interfere with the Mortgagee’s decisions on the order of actions the Mortgagee takes against the mortgages and/or security instruments.

IN WITNESS WHEREOF, the undersigned has executed these presents as of the day and year first above written.

TLM PARTNERS LTD.

By _____
THOMAS E. McCONNELL
Its General Partner

“Mortgagor” and “Borrower”

NOTICE IS HEREBY GIVEN BY MORTGAGEE THAT MORTGAGOR IS FREE TO PROCURE ANY INSURANCE POLICY REQUIRED BY THIS INSTRUMENT FROM ANY INSURANCE COMPANY AUTHORIZED TO DO BUSINESS IN THE STATE OF HAWAII.

STATE OF CALIFORNIA)
) SS.
COUNTY OF SANTA BARBARA)

On _____, 2012, before me personally appeared THOMAS E. McCONNELL, to me personally known, who being by me duly sworn (or affirmed), did say that such person executed the foregoing instrument as the free act and deed of such persons, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacity.

Document Description: MORTGAGE, SECURITY AGREEMENT, FINANCING STATEMENT AND ASSIGNMENT OF RENTALS

Doc. Date: _____ No. pages: _____

Notary Signature _____ Date _____

Name (printed): _____

My Commission expires: _____

PARCEL FIRST:

All of that certain parcel of land situate at Niu, Honolulu, City and County of Honolulu, State of Hawaii, being **LOT 28** of the “**NIU BEACH LOTS**”, as shown on File Plan Number 279, filed in the Bureau of Conveyances of the State of Hawaii, and containing an area of 10,907 square feet, more or less.

PARCEL SECOND:

All of that certain parcel of land (being portion(s) of the land(s) described in and covered by Royal Patent Number 52, Land Commission Award Number 802 to Alexander Adams) situate. lying and being on the south side of Kalanianaʻole Highway, West of Niu-Iki Circle, at Niu, Honolulu, City and County of Honolulu, State of Hawaii, being **A PORTION OF LOTS A-28-C AND A-30-B-1-B**, and thus bounded and described as per survey of Dennis K. Hashimoto, Licensed Professional Land Surveyor, dated April 1, 2002, to-wit:

Beginning at the northwest corner of this parcel of land, being also the south side of Kalanianaʻole Highway, the coordinates of said point of beginning referred to Government Survey Triangulation Station “**KOKO HEAD**” being 6,164.48 feet north and 11,485.81 feet west and measured clockwise from true South:

1. 253° 56’ 60.41 feet along the south side of Kalanianaʻole Highway;
2. 337° 16’ 86.68 feet along the remainders of parcels A-28-C and A-30-b-1-b;
3. 67° 16’ 60.00 feet along Parcel A-30-b-1-b and Lot 28 of Niu Beach Lots (File Plan 279);
4. 157° 16’ 93.69 feet along the remainder of parcels A-30-b-1-b and A-28-C to the point of beginning and containing an area of 5,410 square feet, more or less;

Being the premises conveyed to **TLM PARTNERS, LTD.**, a Colorado limited partnership, by Warranty Deed dated April 12, 2002, recorded in the Bureau of Conveyances of the State of Hawaii as Document No. 2002-071038;

SUBJECT, HOWEVER, to the following:

1. Reservation in favor of the State of Hawaii of all mineral and metallic mines;

2. **AS TO PARCEL FIRST:**

Location of the seaward boundary in accordance with the laws of the State of Hawaii and shoreline setback line in accordance with County regulation and/or ordinance and the effect, if any, upon the area of the land described herein.

3. Encroachment(s) as shown on the survey map prepared by Dennis K. Hashimoto, Land Surveyor, with DJNS Surveying & Mapping, Inc., dated March 28, 2002.

4. Structure position discrepancies as shown on the survey map prepared by Dennis K. Hashimoto, Land Surveyor, with DJNS Surveying & Mapping, Inc., dated March 28, 2002.

(Note: The foregoing is subject to the provisions of Chapter 669, Hawaii Revised Statutes.)

END OF EXHIBIT "A"

[A1]RYT deleted nonrecourse per Kugle's agreement.

[A2]State does not warrant title. All easements and leases are taken as is, where is, with no warranties.